



FEDERAL ELECTION COMMISSION
Washington, DC 20463

DATE & TIME OF TRANSMITTAL: **Friday, November 6, 2015** **2:45**

BALLOT DEADLINE: **Friday, November 6, 2015** **3:45**

COMMISSIONER: GOODMAN, HUNTER, PETERSEN, RAVEL, WALTHER, WEINTRAUB

SUBJECT: **Petition for Rulemaking to Amend 11 C.F.R. § 110.13(c) -
Draft Notice of Disposition. Memorandum to the
Commission dated November 6, 2015**

- () I approve the recommendation(s).
- () I object to the recommendation(s).
- () I object for the record.
- () I am recused from voting.
- () No vote by ballot.

COMMENTS: _____

DATE: _____ SIGNATURE: _____

A definite vote is required. All ballots must be signed and dated. Please return
ONLY THE BALLOT to the Commission Secretary. Please return ballot no later
than date and time shown above.

FROM THE OFFICE OF THE SECRETARY OF THE COMMISSION



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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FEDERAL ELECTION COMMISSION
11-06-2015

2015 NOV -6 PM 2:29

November 6, 2015

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
Acting General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: Petition for Rulemaking to Amend 11 C.F.R. § 110.13 (c) – Draft
Notice of Disposition

Attached is a draft of the subject notice of disposition. We ask that this be placed on a 1-hour tally vote ending on November 6, 2015.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 110

[NOTICE 2015-XX]

Candidate Debates

AGENCY: Federal Election Commission.

ACTION: Notice of Disposition of Petition for Rulemaking.

SUMMARY: The Commission announces its disposition of a Petition for Rulemaking (“petition”) filed on September 11, 2014, by Level the Playing Field. The petition asks the Commission to amend its regulation on candidate debates to revise the criteria governing the inclusion of candidates in presidential and vice presidential candidate debates. The Commission is not initiating a rulemaking at this time. The petition and other documents relating to this matter are available on the Commission’s website, www.fec.gov/fosers (reference REG 2014-06), and in the Commission’s Public Records Office.

DATES: [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Jessica Selinkoff, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On September 11, 2014, the Commission received a Petition for Rulemaking from Level the Playing Field regarding the Commission’s regulation at 11 CFR 110.13(c). That regulation governs the criteria that debate staging organizations (which the petitioner refers to as “sponsors”) use for inclusion in candidate debates. The regulation requires staging organizations to “use pre-established objective criteria to determine which candidates may participate in a debate” and further specifies that, for general election debates,

1 staging organizations “shall not use nomination by a particular political party as the sole
2 objective criterion to determine whether to include a candidate in a debate.” 11 CFR 110.13(c).
3 The petition asks the Commission to amend 11 CFR 110.13(c) in two respects: (1) to preclude
4 sponsors of general election presidential and vice presidential debates from requiring that a
5 candidate meet a polling threshold in order to be included in the debate; and (2) to require
6 sponsors of general election presidential and vice presidential debates to have a set of objective,
7 unbiased criteria for debate participation that do not require candidates to satisfy a polling
8 threshold.

9 The Commission published a Notice of Availability seeking comment on the petition on
10 November 14, 2014. Candidate Debates, 79 FR 68137. The Commission received 1264
11 comments in response to that notice. One comment, that of an organization that stages
12 presidential and vice presidential debates, opposed the petition; the remaining comments either
13 supported the petition or took no position thereon.

14 The petition and many of the comments supporting it argue that a staging organization’s
15 requirement that a candidate meet a polling threshold for inclusion in a debate unfairly benefits
16 major party candidates at the expense of independent and third party candidates. As an
17 alternative, the petition and some of the comments proposed requiring staging organizations to
18 include each candidate who has qualified for the general election ballot in states that collectively
19 have enough Electoral College votes for the candidate to attain the presidency.¹ The petition
20 states that this would provide an objective, and more inclusive, criterion preferable to polling
21 thresholds. Other commenters did not necessarily support or oppose the petitioner’s proposed
22 alternative but supported a rulemaking to determine if changes are warranted. Still other

¹ Specifically, the petitioner proposes that a presidential candidate who, at a given date during the election year, has secured ballot access in states that collectively have at least 270 Electoral College votes (of a total possible 538 votes), could potentially qualify to participate in the general election debate.

commenters proposed alternative and additional rule modifications for the Commission's consideration, such as a requirement that debate staging organizations provide the public with information about candidates not included in a debate.

The commenter that opposed the petition urged the Commission to continue allowing a debate staging organization substantial discretion in formulating the nonpartisan objective candidate selection criteria of its choice. This commenter further argued that its particular polling thresholds are reasonable and objective selection criteria adopted for nonpartisan reasons and designed to advance voter education. This commenter also asserted that the petitioner's proposed alternative would favor early ballot qualification by candidates with the most resources over more meaningful measures of candidate support and viability.

The Commission has evaluated the petition and comments and decided not to initiate a rulemaking to amend 11 CFR 110.13(c) at this time.

As the Commission stated in adopting the current candidate debate rule in 1995, "the purpose of section 110.13 . . . is to provide a specific exception so that certain nonprofit organizations . . . and the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in debates." Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 FR 64260, 64261 (Dec. 14, 1995).² Accordingly, the Commission has required that debate "staging organizations use pre-established objective criteria to avoid the real or apparent potential for a quid pro quo, and to ensure the integrity and fairness of the process." *Id.* at 64262. In discussing objective selection criteria, the Commission has noted that debate staging organizations may use

² See also Funding and Sponsorship of Federal Candidate Debates, 44 FR 76734 (Dec. 27, 1979) (explaining that, through candidate debate rule, costs of staging multi-candidate nonpartisan debates are not contributions or expenditures); 11 CFR 100.92 (excluding funds provided for costs of candidate debates staged under 11 CFR 110.13 from definition of "contribution"); 11 CFR 100.154 (excluding funds used for costs of candidate debates staged under 11 CFR 110.13 from definition of "expenditure").

1 them to “control the number of candidates participating in . . . a meaningful debate” but must not
2 use criteria “designed to result in the selection of certain pre-chosen participants.” Id. The
3 Commission has further explained that while “[t]he choice of which objective criteria to use is
4 largely left to the discretion of the staging organization,” the rule contains an implied
5 reasonableness requirement. Id. Within the realm of reasonable criteria, the Commission has
6 stated that it “gives great latitude in establishing the criteria for participant selection” to debate
7 staging organizations under 11 CFR 110.13.³ First General Counsel’s Report at n.5, MUR 5530
8 (Commission on Presidential Debates) (May 4, 2005),
9 <http://eqs.fec.gov/eqsdocsMUR/000043F0.pdf>.

10 The Commission has a well-established history of ensuring that corporate contributions
11 are not made to candidates taking part in debates, including by evaluating the objectivity and
12 neutrality of a debate staging organization’s selection criteria in the Commission’s enforcement
13 process. Enforcement matters regarding that issue have involved a wide range of candidate
14 selection criteria, including polling thresholds (from 5% to 15%), campaign finance activity
15 levels (such as a minimum number of contributors as shown in reports filed with the
16 Commission), campaign engagement levels (such as numbers of yard signs or participation in
17 neighborhood association meetings), ballot access, and office eligibility. See, e.g., First General
18 Counsel’s Report at 5 n.5, MUR 5530 (Commission on Presidential Debates) (May 4, 2005),
19 <http://eqs.fec.gov/eqsdocsMUR/000043F0.pdf> (including 15% polling threshold and ballot
20 access criteria). In each of these matters, the Commission evaluated whether the criteria were
21 objective, pre-established, and not arranged in a manner to promote or advance one candidate
22 over another so as to constitute corporate contributions to the participating candidates.

³ See Candidate Debates and News Stories, 61 FR 18049 (Apr. 24, 1996) (quoting H.R. Rep. No. 93-1239 at 4 (1974)).

1 In these enforcement matters, the Commission has carefully examined the use of polling
2 thresholds and found that they can be objective and otherwise lawful selection criteria for
3 candidate debates. Indeed, almost two decades ago, the Commission found that a staging
4 organization's use of polling data (among other criteria) did not result in an unlawful corporate
5 contribution, with five Commissioners observing that it would make "little sense" if "a debate
6 sponsor could not look at the latest poll results even though the rest of the nation could look at
7 this as an indicator of a candidate's popularity." MUR 4451/4473 Commission Statement of
8 Reasons at 8 n.7 (Commission on Presidential Debates) (Apr. 6, 1998),
9 http://www.fec.gov/disclosure_data/mur/4451.pdf#page=459. Citing this statement, one court
10 noted with respect to the use of polling thresholds as debate selection criteria that "[i]t is difficult
11 to understand why it would be unreasonable or subjective to consider the extent of a candidate's
12 electoral support prior to the debate to determine whether the candidate is viable enough to be
13 included." Buchanan v. FEC, 112 F. Supp. 2d 58, 75 (D.D.C. 2000).

14 Because the regulation at issue is designed to provide debate sponsors with discretion
15 within a framework of objective and neutral debate criteria, and because the Commission can
16 evaluate the objectivity and neutrality of a debate sponsor's selection criteria through the
17 enforcement process, the Commission finds that the rulemaking proposed by the petition is not
18 necessary at this time. The Commission concludes that section 110.13(c) in its current form
19 provides adequate regulatory implementation of the corporate contribution ban and is preferable
20 to a rigid rule that would prohibit or mandate use of particular debate selection criteria in all
21 debates. See 11 CFR 200.5(c) (listing desirability of proceeding on case-by-case basis as
22 consideration in declining to initiate rulemaking); see also MUR 4451/4473 Commission
23 Statement of Reasons at 8-9 (Commission on Presidential Debates) (noting that Commission

1 cannot reasonably “question[] each and every . . . candidate assessment criterion” but can
2 evaluate “evidence that [such a] criterion was ‘fixed’ or arranged in some manner so as to
3 guarantee a preordained result”).

4 The petition and the commenters who support it rely primarily on policy arguments in
5 favor of debate selection criteria that would include more candidates in general election
6 presidential and vice presidential debates. The rule at section 110.13(c), however, is not
7 intended to maximize the number of debate participants; it is intended to ensure that staging
8 organizations do not select participants in such a way that the costs of a debate constitute
9 corporate contributions to the candidates taking part. Corporate and Labor Organization
10 Activity; Express Advocacy and Coordination with Candidates, 60 FR at 64261-62. Staging
11 organizations’ use of polling criteria is a reasonable way for a debate staging organization to
12 select and “control the number of candidates participating in . . . a meaningful debate,” *id.*, and to
13 do so in a way that is objective and does not constitute a corporate contribution. A per se rule
14 prohibiting the use of polling criteria is therefore not necessary to prevent debates from
15 constituting unlawful contributions.

16 Furthermore, the rule at 11 CFR 110.13(c) already permits the use of criteria by staging
17 organizations that could result in larger numbers of candidates participating in debates. Indeed,
18 the specific criterion that the petition asks the Commission to include in a revised section
19 110.13(c) is already lawful: A debate staging organization has the discretion to stage a general
20 election presidential or vice presidential debate using selection criteria similar to the Electoral
21 College approach preferred by the petitioner (so long as the organization’s reasonable selection
22 criteria are pre-established, objective, and not designed to result in the selection of certain pre-

chosen participants). No rule change is necessary to enable that approach, and the petitioner may sponsor a debate using such criteria or persuade a debate sponsor to do so.⁴

The petition sets forth certain data in support of its argument that the use of polling thresholds as a debate selection criterion by one staging organization “creates a hurdle that third-party and independent candidates cannot reasonably expect to clear,” and therefore is designed to result in the selection of certain pre-chosen participants. Petition at 15. The use of polling data by a single debate staging organization for candidate debates for a single office, however, does not suggest the need for a rule change. The Commission acknowledges that lower (or no) polling threshold selection criteria may open debates to more candidates and that polling thresholds could be used to promote or advance one candidate (or group of candidates) over another. But to the extent that a debate staging organization uses non-objective selection criteria “designed to result in the selection of certain pre-chosen participants,” this would already be unlawful under the Commission’s existing regulation. Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 FR at 64262.

Finally, the Commission notes that the petition focuses on and seeks to amend the rule only with respect to polling threshold criteria in the selection of participants for presidential general election debates. However, the candidate debate rule applies to all debates (primary and general election) “at the presidential, House, and Senate levels.” Funding and Sponsorship of

⁴ If the petitioner (or another entity) is unsure whether it is a debate “staging organization” as defined in 11 CFR 110.13(a), it may ask the Commission for an advisory opinion on the matter. See, e.g., Advisory Opinion 1988-22 (San Joaquin Republicans) (concluding that advisory opinion requestor, which did not yet have relevant tax status, was not within candidate debate exemption). Similarly, if a debate staging organization wishes to ask the Commission to conclude that its proposed candidate selection criteria are objective and not designed to result in the selection of certain pre-chosen participants (and thus protect itself from a later enforcement action), it may seek an advisory opinion on that question. See 52 U.S.C. 30108(c) (establishing scope of protection of advisory opinions).

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Candidate Debates, 44 FR 39348 (July 5, 1979).⁵ In the absence of any indication that polling thresholds are inherently unobjective or otherwise unlawful as applied to all federal elections (and the Commission is aware of no such indication⁶), the Commission declines to initiate a rulemaking that would impose a nationwide prohibition on the use of such thresholds, or that could result in giving different legal effect to the use of polling criterion in different elections.

For all of the above reasons, the Commission therefore declines to commence a rulemaking to amend the criteria for staging candidate debates in 11 CFR 110.13(c).

On behalf of the Commission,

Ann M. Ravel,
Chair,
Federal Election Commission.

DATED: _____
BILLING CODE: 6715-01-P

⁵ Indeed, the Commission has analyzed, in the enforcement context, debate staging organizations' criteria under 11 CFR 110.13(c) at all levels of federal elections. See, e.g., MUR 5650 (Associated Students of the Univ. of Arizona) (Senate debate); MUR 5530 (Commission on Presidential Debates) (presidential general election debates).

⁶ The petitioner provided data intended to demonstrate that polling figures are sometimes inaccurate, but the fact that polls can be inaccurate does not mean that a staging organization acts unobjectively by using them.